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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. LEE VINCENT COTTONE, Defendant and Appellant.	G042923 (Super. Ct. No. 06HF1734) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, M. Marc Kelly, Judge. Affirmed.

William J. Kopeny for Defendant and Appellant.

Kamala D. Harris, Attorney General, and James H. Flaherty III, Deputy Attorney General, for Plaintiff and Respondent.

In our prior published opinion, *People v. Cottone* (2011) 195 Cal.App.4th 245, review granted August 17, 2011, S194107, we reversed Lee Vincent Cottone's convictions for committing a lewd act upon a child under the age of 14. In doing so, we concluded the following: (1) Penal Code section 26[1] is applicable to Evidence Code section 1108; and (2) the trial court erred in not submitting to the jury the issue of whether Cottone appreciated the wrongfulness of his prior sexual misconduct.

In *People v. Cottone* (2013) 57 Cal.4th 269 (*Cottone*), the California Supreme Court reversed, agreeing with our first conclusion but disagreeing with our second. As to the first point, the court concluded, "[T]hat the presumption of incapacity set forth in . . . section 26([, subd.] One) applies when the prosecution seeks to prove that the defendant committed an unadjudicated sexual offense [pursuant to Evidence Code section 1108] before reaching age 14." (*Cottone, supra*, 57 Cal.4th at p. 281.) With respect to the second point, the *Cottone* court stated as follows: "[W]e hold that upon the defendant's timely objection, the trial court must find by clear and convincing evidence that the defendant had the capacity to commit an unadjudicated juvenile offense before admitting that evidence under section 1108. . . . [Citation.] . . . Once the trial court has made that legal determination, [Evidence Code] section 405 does not permit the jury to delve into the nuances of evidentiary rules. Instead, the jury turns to the essential question of what, if anything, the evidence proves." (*Cottone, supra*, 57 Cal.4th at p. 292.) Finally, the *Cottone* court disagreed with our conclusion the trial court had a sua sponte duty to instruct the jury on the issue of capacity. (*Id*. at pp. 292-293.) The court concluded, "[W]e decline to impose a sua sponte duty to instruct that the jury reconsider a fact relating to evidentiary *admission*." (*Id*. at p. 294.) The court remanded the matter back to this court for further proceedings consistent with its opinion.

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[1] All further statutory references are to the Penal Code, unless otherwise indicated.

We invited the parties to submit supplemental letter briefs on the effect of *Cottone,* 57 Cal.4th 269, on further proceedings in this court. The parties agree our prior opinion left unanswered the following two issues that we must now address: (1) the prosecutor failed to present clear and convincing evidence Cottone appreciated the wrongfulness of the 32-year old prior sexual misconduct; and (2) his Sixth Amendment confrontation rights were violated. Neither contention has merit, and we affirm the judgment.

FACTS[2]

B.C., who was eight years old, lived in the South Bay. During school breaks and summer vacation B.C. would visit Cottone, her uncle, and Jeanie Cottone (Jeanie), her aunt, in Irvine for multiday visits. Because B.C. was scared to sleep alone, she would sleep between Jeanie, who wore earplugs, and Cottone, in their bed.

The first evening she slept in the Cottones' bed, B.C. woke up because Cottone was touching her vagina, breasts, and buttocks with his hand. B.C. moved to get Cottone to stop, but she did not tell him to stop. She did not wake up Jeanie, tell her what happened, or say anything to Cottone because she was scared. She did not ask to sleep in the empty bedroom because she was scared to sleep alone. The next night, the same thing happened. When B.C. returned home, she did not tell anyone what happened because she was scared.

On her second visit to the Cottone residence, B.C. again slept with the Cottones. Cottone again touched her vagina, breasts, and buttocks.

When B.C. was 11 or 12 years old, B.C.'s sister, K.C., and B.C.'s cousin, C.C., began spending the night at the Cottone residence; this occurred approximately 10 to 15 times. The three girls slept in a bed in the guestroom; B.C. and C.C. would sleep on the outside and K.C. would sleep in the middle. During the night, Cottone would

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[2] The statement of facts is taken largely from our prior published opinion. On remand, we have included additional procedural facts to address the issues on appeal.

enter the dark room, sit on the bed, and pull back the covers. Cottone would touch B.C.'s vagina, breasts, and buttocks. B.C. did not tell her sister or cousin what had happened because she was scared.

B.C. spent the night at the Cottone residence between two and four days, three to four times a year for approximately four years, and Cottone touched B.C. inappropriately every time she spent the night.

At some point, B.C. began telling her mother, J.C., she did not want to spend the night at her uncle and aunt's house. J.C. would tell B.C. that Jeanie was expecting her, and B.C. would go. B.C. did not tell her mother why she did not want to spend the night.

A few years later, B.C. and her mother were going to a family function. J.C. was complaining about how Cottone treated her son, and B.C. said, "'Well, if you think that's bad, you should -- you don't want to know what he ha[d] done to [her][.]'" B.C. told her mother what had happened.

An information charged Cottone with four counts of committing a lewd act upon a child under the age of 14 (§ 288, subd. (a)) (count 1). The information alleged he had substantial sexual conduct with a child as to all counts (§ 1203.066, subd. (a)(8)). Cottone's first trial ended with a hung jury and a mistrial.

Before his second trial, Cottone moved to exclude evidence of a covertly recorded telephone call and evidence of prior sexual misconduct. The prior sexual misconduct consisted of a 1966 incident where 13- or 14-year-old Cottone allegedly touched the vagina of his five- or six-year-old sister, L.C. The covertly recorded telephone call concerned a telephone call L.C. made to Cottone in 2006 to get him to confess to touching her vagina in 1966. The following month, Cottone filed a supplement to his motion. The prosecutor responded to the motion, and Cottone replied.

At an Evidence Code section 402 hearing, L.C. testified she was born July 1961. L.C. stated she started kindergarten in 1966 when she was five years old. She

said school started in September and she met her friend, L.P., on the first day of kindergarten. L.C. stated her home had a basement, and her brothers' bedrooms were in the basement, and her and her sisters' bedrooms were on the ground level. She testified L.P. was at her house when Cottone asked them if they wanted to go downstairs and play a game called, "giggy-giggy." L.C. stated L.P. went home, and Cottone picked her up and carried her downstairs to the most secluded part of the basement; they were alone. She said that just outside the doorway to Cottone's bedroom, Cottone put his finger in her underpants and touched her vagina. L.C. also testified to a *subsequent* incident where L.P. spent the night and Cottone entered L.C.'s bedroom and put his hands on L.P. L.C. told Cottone to leave, which he did, before L.P. woke up. She could not remember the temporal proximity of the two incidents.

After discussing the applicable case law, the trial court ruled section 26 was applicable to Evidence Code section 1108. The trial court stated the prosecutor rebutted with clear and convincing evidence section 26's presumption by establishing "the minor appreciated the wrongfulness of the charged conduct at the time it was committed." The court stated that although the record was somewhat unclear, it appeared Cottone was "very close to 14 years of age[]" and "the closer the minor gets to age 14 on a sliding scale, the more he is going to appreciate the wrongfulness of his conduct." Concerning the circumstances of the prior sexual misconduct, the court stated Cottone turned the sexual contact into a game. In concluding Cottone appreciated the wrongfulness of his conduct, the court explained: "He attempted to lure the witness downstairs. And it shows to me concealment. He went down to the bedroom area with no one else around. He initially also wanted to play the game with [L.P.], she declined, which to the court, based on what happened, is evidence that he had a propensity for sexual contact with young girls even at a young age." The court explained Cottone's age, the ruse, and the concealment, "alone may not be enough to rebut the presumption, [but] everything taken together . . . rebuts the presumption." In concluding Cottone appreciated the

wrongfulness of his conduct, the court found the subsequent incident where Cottone went into L.C.'s bedroom and touched L.P. "crucial" to its determination.

The trial court, after reviewing the moving papers and hearing argument, ruled the evidence of the 1966 incident regarding L.C. was admissible pursuant to Evidence Code section 1108. The court explained the prior sexual misconduct evidence was highly probative because it was similar to the charged offenses. After explaining why the evidence was not inflammatory and would not confuse the issue, the court opined the similarities between the charged offense and the prior sexual misconduct evidence balanced out the remoteness. The court concluded the prior sexual misconduct evidence would not evoke an emotional bias against Cottone and the probative value of the evidence outweighed any undue prejudice.

With respect to admission of the covertly recorded telephone conversation, the trial court stated that although it ruled the evidence admissible in the first trial, the court would not admit it in the second trial pursuant to Evidence Code section 352 because of irrelevant information concerning family history, other sexual conduct, and drug use. The court added: "Now, that being stated, I don't know what your cross-examination is going to bring forth with [L.C.], but if there is -- if her credibility obviously goes into issue concerning the incident, what happened, whether she is being truthful, those types of things, you know, I don't know where you're going with that. But that, you know, could possibly open the door towards the tape coming in. Because it's clear . . . Cottone on the tape acknowledges doing something to L.C. [¶] So I say that -- So I'm going to exclude it. So your motion to admit that tape is denied without prejudice, okay. And I don't know where it's going to come forward. If you feel at some point in time it now has become much more relevant, even if in its difficult context actual form, then I will revisit it." Cottone's defense counsel was silent.

When the prosecutor inquired whether the admissions on the tape were admissible, the trial court opined the statements "can be viewed as admission of guilt"

but it was unfair to admit only portions of the tape. The court concluded, "I agree with the defense on that. So at least at this point in time you're not going to be able to, but I don't know what's going to happen throughout the course of this trial." After the prosecutor acknowledged the court's ruling, the court added, "But at least at this point in the proceedings the covert call is out of evidence." When the court inquired whether Cottone's defense counsel had anything to add, counsel replied, "No, your honor."

At trial, the prosecutor offered B.C.'s testimony as detailed above. Defense counsel cross-examined B.C. thoroughly about when the visits began, when the visits ended, the frequency of the visits, and the number of times Cottone molested her. Defense counsel used B.C.'s prior testimony to challenge her credibility.

The prosecutor also offered the testimony of Dr. Laura Brodie, a clinical and forensic psychologist, who is an expert in child sexual abuse accommodation syndrome, a syndrome where it is assumed a child was sexually abused to evaluate the child's behavior. Brodie, who was not familiar with the facts of this case, testified it was normal for a child to delay reporting sexual abuse for five years.

The prosecutor offered the testimony of L.C., Cottone's sister, who stated she is eight to nine years younger than Cottone; Cottone was 56 years old at the time of trial. L.C. testified to the following: when she was five or six years old she was in the kitchen with her friend and Cottone, and she did not think anyone else was home. Cottone asked them if they wanted to go into the basement and play a game called "giggy giggy." Her friend went home. Cottone picked up L.C., put her on his shoulder, and carried her downstairs. When they were in the basement, just outside one of the bedrooms, Cottone put his finger in her underwear and touched her vagina. L.C. did not think he put his finger inside her vagina. Cottone's defense counsel did not cross-examine L.C.

Cottone offered C.C.'s testimony. C.C., 14 years old at the time of trial, testified Cottone was her grandfather. C.C. confirmed she frequently spent the night at

her grandfather's home with B.C. and K.C. and the three girls slept together either in a bedroom, in the hallway, or on the sofa. She stated Cottone never tried to touch her or touched her inappropriately. She said B.C. never told her that Cottone touched her inappropriately.

Cottone also offered the testimony of his cousins, who were in their mid-20s at the time of trial. They testified that when they were young girls, approximately the same age as B.C., they frequently spent the night at Cottone's house, and he never touched either of them inappropriately.

Finally, Cottone offered his wife's testimony. Jeanie testified that beginning in 1999 and for the next couple years, B.C. frequently asked to join Cottone in various outings. Jeanie claimed she did not wear earplugs when B.C. spent the night.

The jury convicted Cottone of all counts and found true the enhancement allegations. The trial court sentenced Cottone to six years in prison.

DISCUSSION

I. Wrongfulness of Prior Sexual Misconduct-Clear and Convincing Evidence

Cottone argues there was not clear and convincing evidence establishing that when he was nearly 14-years-old he appreciated the wrongfulness of touching his sister's vagina. We disagree.

A minor under the age of 14 is presumed incapable of committing a crime. (§ 26, subd. One.) To overcome the presumption, the People must show by clear and convincing evidence that "the minor appreciated the wrongfulness of the charged conduct at the time it was committed." (*In re Manuel L.* (1994) 7 Cal.4th 229, 232.) "'Clear and convincing evidence' means 'evidence which is so clear as to leave no substantial doubt and as sufficiently strong to command the unhesitating assent of every reasonable mind. [Citations.] It has been said that a preponderance calls for probability, while clear and convincing proof demands a *high probability*.' [Citation.]" (*People v. Juhasz* (2013) 220 Cal.App.4th 133, 139.)

The court's determination may be based on circumstantial evidence, such as "the minor's age, experience and understanding, as well as the circumstances of the offense including its method of commission and concealment. [Citation.]" (*In re Jerry M.* (1997) 59 Cal.App.4th 289, 298.) We review the record in the light most favorable to the judgment and affirm the trial court's finding if supported by substantial evidence. (*In re James B.* (2003) 109 Cal.App.4th 862, 872 (*James B.*).)

Here, Cottone's age and the circumstances of the offense provided clear and convincing evidence for the trial court to conclude Cottone understood the wrongfulness of the 1966 sexual offense misconduct. "[A] minor's 'age is a basic and important consideration [citation], and, as recognized by the common law, it is only reasonable to expect that generally the older a child gets and the closer [he] approaches the age of 14, the more likely it is that [he] appreciates the wrongfulness of [his] acts.' [Citation.]" (*People v. Lewis* (2001) 26 Cal.4th 334, 378 (*Lewis*).) Here, although Cottone says he was "13+," the evidence at trial established he was almost 14 years old, and the court concluded he was "very close to 14 years of age." Contrary to Cottone's claim otherwise, his age tends to establish he appreciated the wrongfulness of his act.

Additionally, the circumstances of the prior sexual misconduct evidence also demonstrate Cottone appreciated the wrongfulness of the prior sexual misconduct evidence. The evidence established Cottone employed a ruse to get L.C. and L.P. to go downstairs into the basement to play a game where he would be alone with them. From this evidence the court could reasonably find Cottone was sophisticated enough to know the young girls would be excited to play a game and accompany him downstairs. Evidence of this type of sophisticated reasoning supports the conclusion Cottone knew what he was doing was wrong.

Moreover, Cottone's success in concealing the prior sexual offense misconduct also demonstrates he appreciated the wrongfulness of his act. L.C.'s testimony established that after L.P. went home, Cottone picked up L.C. and took her into

the basement. Contrary to Cottone's assertion otherwise, there is evidence he engaged in conduct designed to conceal the crime. L.C. testified Cottone carried her downstairs to the most secluded part of the basement outside Cottone's bedroom. L.C. stated that they were alone in the house. This evidence established Cottone knew his conduct was wrong because he took L.C. from the main floor where someone would enter the home downstairs in the basement where he increased his chance of aborting his plan if he heard someone enter the home on the first floor. He put as much physical distance between him and L.C., and someone entering the home as possible. (*Lewis, supra,* 26 Cal.4th at p. 378 [evidence concealment demonstrates knowledge of wrongfulness]; *In re Tony C.* (1978) 21 Cal.3d 888, 901 [evidence nearly 14-year-old minor took victim to secluded location behind fence on dead-end street to rape her tends to establish minor appreciated wrongfulness of act].) The fact Cottone did not further conceal L.C. in his bedroom does not alter our conclusion.

Cottone takes issue with the trial court's reliance on the sleepover incident that occurred *after* the prior sexual offense misconduct the prosecutor sought to admit. It is true L.C.'s testimony established the sleepover incident occurred after the incident where Cottone took L.C. into the basement. It is also true the trial court concluded the sleepover incident evidence was important in determining whether Cottone appreciated the wrongfulness of the prior sexual misconduct evidence. Although we agree it is dangerous to conclude a *subsequent* event establishes a defendant's intent on a *prior* occasion without knowing the temporal proximity of the events, here that evidence was just part of what the court relied on in making its determination. Even were we to conclude it was error for the court to rely on the subsequent incident, Cottone's age, the ruse, and the concealment constituted clear and convincing evidence Cottone appreciated the wrongfulness of his act.

Cottone also grouses the record is devoid of any evidence of his IQ, his academic performance, his sexual experience, or his understanding of right and wrong.

His reliance on what is missing from the record does not assist us in determining whether the prosecutor satisfied its burden of proof with the evidence it did offer. Cottone essentially asks us to reweigh the evidence, which is not our role on appeal. (*James B., supra,* 109 Cal.App.4th at p. 872.) Therefore, we conclude the evidence of Cottone's age, the ruse he employed to lure L.C. into the basement, and his concealment of the act was so clear as to leave no substantial doubt he appreciated the wrongfulness of his act.

II. Sixth Amendment Confrontation Clause

Cottone contends the trial court denied his Sixth Amendment right to cross-examine L.C. by "threatening" it may admit evidence of the covertly recorded telephone call if defense counsel placed L.C.'s credibility in issue. Not so.

"As the high court has explained, cross-examination is required in order 'to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.' (*Davis v. Alaska* (1974) 415 U.S. 308, 318 . . . .) '[A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness . . . .' (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680 . . . .) The trial court, of course, has a 'wide latitude' of discretion to restrict cross-examination and may impose reasonable limits on the introduction of such evidence. [Citation.] Thus, 'unless the defendant can show that the prohibited cross-examination would have produced "a significantly different impression of [the witnesses'] credibility" [citation], the trial court's exercise of its discretion in this regard does not violate the Sixth Amendment.' [Citations.]" (*People v. Smith* (2007) 40 Cal.4th 483, 513.)

Here, Cottone has forfeited his Sixth Amendment confrontation clause claim because his defense counsel did not object on these grounds at trial. (*People v. Redd* (2010) 48 Cal.4th 691, 730 [defendant forfeited confrontation clause claim when he did not object on that ground at trial].) Additionally, at no time did defense counsel make

any offer of proof to the trial court as to areas of inquiry he wished to make to impeach L.C.'s testimony, which he believed were precluded by the court's comment. After the court ruled the recorded telephone conversation was inadmissible but that it would revisit the issue if L.C.'s credibility became an issue at trial, defense counsel did not object. When the court inquired whether defense counsel had anything to add, counsel responded, "No." We cannot evaluate Cottone's claim his confrontation clause rights were violated when the issue was not litigated below. The adequacy of the record for review is the appellant's responsibility. (Evid. Code, § 354, subd. (a); *People v. Whalen* (2013) 56 Cal.4th 1, 84-85.)

In any event, we conclude Cottone was not prejudiced. Cottone has not explained how the prohibited cross-examination would have produced a significantly different impression of L.C.'s credibility. Relying on his defense counsel's renowned cross-examination skills, Cottone asks, "How can this court be certain that defense counsel was prohibited from challenging the credibility of the very assailable [L.C.'s] credibility?" That is not the applicable test. On appeal, Cottone must demonstrate that had the trial court not "threatened" counsel and prohibited cross-examination, which we are not convinced it did here, the jury would have been left with a significantly different impression of the witnesses' credibility. Cottone has offered no compelling facts to satisfy this burden. His failure on appeal can be attributed at least in part to defense counsel's failure to litigate the issue below.

Cottone asserts *Olden v. Kentucky* (1988) 488 U.S. 227 (*Olden*), requires reversal. *Olden* is inapposite. In that case, the Supreme Court held the trial court violated defendant's Sixth Amendment rights when it limited cross-examination of the victim to preclude inquiry into the victim's motive to fabricate the sexual assault allegations. (*Id.* at pp. 231-232.) The defense's theory was the alleged victim, who was white, had consensual sex with defendant, who was black, and then fabricated the rape charges against defendant to protect her ongoing relationship with her live-in boyfriend.

(*Id.* at p. 230.) The trial court held the potential prejudice created by exposing the interracial relationship between the alleged victim and the alleged perpetrator outweighed its probative value to defendant's case. (*Id.* at pp. 230-231.) The Court reversed defendant's conviction and found that testimony regarding the relationship would have provided the jury with a "'significantly different impression of [the victim's] credibility.'" (*Id.* at p. 232.) The Court concluded that the "[s]peculation as to the effect of the jurors' racial biases cannot justify exclusion of cross-examination with such strong potential to demonstrate the falsity of [the [victim's]] testimony." (*Ibid.*)

Olden is distinguishable because that case involves impeachment based on evidence of the victim's motive to fabricate charges rather than an attack on a witness's general credibility. Additionally, in that case, defendant's counsel demonstrated the cross-examination would have provided the jury with a significantly different impression of the victim's credibility. As we explain above, Cottone failed to make this showing. Thus, Cottone's Sixth Amendment confrontation clause rights were not violated.

DISPOSITION

The judgment is affirmed.

O'LEARY, P. J.

WE CONCUR:

ARONSON, J.

IKOLA, J.